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82-2053

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

ELMER H. SINGLETON,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Leonard T. Jernigan, Jr.
MICHAELS & JERNIGAN
Cooper Square
17 Glenwood Avenue
Raleigh, North Carolina 27603

and

MOODY, STROPLE, BRAHM
& LAWRENCE, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705-1138

Counsel for Petitioner

June 14, 1983

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I. QUESTIONS PRESENTED

1. Where credibility is a factor in weighing the evidence on contributory negligence, and the jury has determined that a plaintiff was free of such negligence and is entitled to damages of one million dollars ($1,000,000.00), has the Seventh Amendment right to a jury trial been violated where the district court grants the defendant's motion for a judgment notwithstanding the verdict?

2. Where a Circuit Court of Appeals fails to follow its own precedent set by another panel, should the Supreme Court exercise its supervisory power to control the uniform administration of justice?

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v.

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Elmer H. Singleton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, decided February 7, 1983.

OPINION BELOW

The opinion of the District Court for the Eastern District of Virginia appears in the Appendix hereto. The unpublished opinion of the Court of Appeals for the Fourth Circuit also appears in the Appendix, as well as the order denying the petition for rehearing and suggestion for rehearing *en banc*.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 7, 1983, and a timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 16, 1983. The petition for certiorari was filed within ninety days of the date of final judgment. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution reads as follows:

> In Suits at Common Law, where a value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law.

STATEMENT OF THE CASE

Elmer H. Singleton, petitioner, filed this diversity of citizenship case on January 26, 1981 in the United States District Court for the Eastern District of Virginia against Virginia Electric and Power Company (Vepco) and Arthur J. Lancaster, Jr., doing business as Bennett's Creek Wholesale Nursery (Lancaster). The petitioner alleged that Vepco and Lancaster were negligent in maintaining and permitting high voltage utility wires to exist over a dumping area at the nursery, and that as a result of this joint negligence the petitioner sustained severe and permanent electrical injuries which required the amputation of his right arm, several toes on both feet, and rendered him totally disabled.

The case was tried before a jury on September 23, 24, 25, 28, 29, and 30, 1981 in Norfolk, Virginia, before District Judge Walter E. Hoffman. At the conclusion of the Plaintiff's evidence, both Defendants moved for directed verdicts. The trial court granted Lancaster's motion on the ground that the Plaintiff had failed to make out a jury issue as to Lancaster's negligence. The trial court denied the motion of Vepco. During the course of the trial, Judge Hoffman ruled that there was a jury issue as to the negligence of Vepco and as to Singleton's contributory negligence.

After being properly instructed by the court, the jury returned a verdict for the petitioner in the amount of one million dollars ($1,000,000.00). Vepco then requested that the jury's decision be overturned, and moved the court for a judgment notwithstanding the verdict on the grounds that Singleton was contributorily negligent as a matter of law and that Vepco was free of any negligence. The district court reviewed briefs and oral argument on the issue of contributory negligence of the petitioner, and thereafter ruled that he was contributorily negligent and sustained Vepco's motion. Final judgment for Vepco was entered on February 23, 1982.

Singleton gave Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. Oral argument was heard on December 6, 1982 in Richmond, Virginia and on February 7, 1983 the Fourth Circuit handed down an unpublished two-paragraph opinion in which it stated in part, "...we too are persuaded that plaintiff was guilty of contributory negligence as a matter of law..." A timely petition for rehearing and a suggestion for rehearing *en banc* was filed on February 18, 1983. The basis of the petition for rehearing was that a recent Virginia case, *Wells v. McMann,* 223 Va. 192, 288 S.E.2d 43 (1982), was unknown to the court when it made its decision and also that the Virginia

Supreme Court was about to decide a case concerning contributory negligence in electrocution cases *Vepco v. Winesett,* No. 801872 (1983). It was requested that the court rehear the *Singleton* case in light of these recent developments in Virginia law.

The suggestion for a rehearing *en banc* was made on the basis that prior to the decision being handed down in *Singleton,* another panel of the Fourth Circuit had reviewed a similar electrocution case, *Keller v. Virginia Electric and Power Company,* No. 81-2199, decided May 10, 1982, in which the jury had determined that the plaintiff was guilty of contributory negligence. The Fourth Circuit had affirmed the jury's decision and held that "...the case was fairly tried and fairly submitted to the jury." It was suggested to the court that a conflict between the panels existed and that it would be appropriate in order to maintain conformity of the court's decision to rehear the *Singleton* case *en banc.* It was also suggested that a rehearing *en banc* was appropriate because the case raised significant issues concerning the conflict between the respective functions of judge and jury, particularly where credibility was at issue. On March 16, 1983 the Fourth Circuit denied the petition for rehearing.

On February 3, 1979, the date that Mr. Singleton was electrocuted, he had been a truck driver for approximately two years with no prior accidents of any nature. He was 39 years old, was married and had five children, and was a resident of Kentucky. He was ordered to take a load of wood chips to Mr. Lancaster's nursery in Portsmouth, Virginia, and he had never delivered to this nursery before. Mr. Singleton denied that he had been warned of any power lines at the nursery where he was supposed to dump the wood chips, and denied that he ever saw the power lines prior to sustaining his injuries. This testimony was contradicted by a defense witness, who claimed he told Mr. Singleton about the utility wires.

Mr. Singleton arrived at the nursery area at approximately 2:00 p.m. The weather was partially cloudy with a cold wind blowing and a chill factor of 26 degrees. He entered a gravel road from off the highway and observed the dumping area approximately two-tenths of a mile down the road and to his right. He testified that he looked for overhead obstructions or other hazards as he drove toward the dumping site. Photographs of his view showed that the uninsulated utility wires blended into the background of trees behind the dumping pit. On two other occasions as he got closer to the dumping site he again looked for overhead obstructions but did not see any. Upon making the determination that it was safe to dump in this area, he backed his truck up to the dumping pit. He got out of the cab of the tractor, walked across a narrow catwalk over the tires and tripped the tailgate lever. While doing this his body was in a bent position at all times.

He then engaged the power take-off so the load would dump, and the trailer began lifting in the air so the wood chips would slide out. He raised the trailer bed slowly to avoid a sudden shifting of the load, and it took approximately one minute for the load to raise up. He watched the mirrors on both sides of the truck and could see the back end of the trailer and tops of the rear tires. During this unloading process, unknown to Singleton, the top of the trailer had come into contact with an overhead high voltage utility wire. This wire did not run across the dumping pit, but instead ran parallel to and just inside one of the sides of the pit. The wire was three-tenths of an inch in diameter and was made of aluminum. It had been installed approximately five years prior to the injury and because of its age had turned a slight dull-gray color.

It was necessary for Singleton to leave the cab in order to see whether the wood chips had completely unloaded. As he began to step to the ground he was holding onto a metal handle on the cab, and when he finally touched the ground he felt excruciating pain. He could not move, make a sound or see, although he could smell his flesh burning. In effect, he had grounded the energized cab. The arm holding onto the handle was eventually amputated, as well as several toes on both feet.

Evidence showed that trailers similar to the one Singleton had been driving on February 3, 1979 had been delivering products to the dumping pit for approximately twelve months before the injury. Lancaster, the owner of the nursery, testified that in his opinion the overhead wires were "open and obvious." However, he also stated that he was careful to meet any truck that was going to make a delivery at the nursery in order to warn the truck drivers of the presence of the overhead wires. Neither Lancaster nor any of his agents were at the nursery on the day Mr. Singleton arrived to deliver his load. Mr. Singleton was the first and only truck driver who had not been warned by Lancaster about the presence of these wires.

Other witnesses for the Defendants testified that the lines were "open and obvious." Mr. Singleton denied this fact, and photographs introduced into evidence also revealed that the lines could easily fade into the background of trees and clouds, depending on the angle of the view.

Mr. Singleton offered expert testimony to the jury which showed that Vepco maintained a recloser, which is a fault-protective device intended to break the current flowing through the lines if it exceeds a level of 200 amperes. If the current did exceed this amount the recloser should cut off current through the lines in approximately 11.5 seconds. The expert concluded that there had been enough current going through the lines after the trailer made contact with

the line to activate the recloser prior to Mr. Singleton's stepping to the ground.

Vepco's own maintenance records of the recloser in question showed that the recloser had not been properly inspected and maintained. It was the expert's opinion that the recloser did not operate properly because it had not been inspected, and that Singleton would not have been injured if the recloser had worked correctly. He also testified that because the wires were not insulated Vepco had failed to comply with industry standards and good engineering practice.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the Seventh Amendment right to trial by jury, and has sanctioned the district court's invasion of the jury's province.

This case squarely addresses the powerful conflict between judge and jury in our federal judicial system, and needs review by this Court in order to reinforce and protect each citizen's Seventh Amendment right to a trial by jury. Although the Court should naturally be reluctant to grant a writ for every case in which a Seventh Amendment violation is alleged, it is respectfully contended that the facts of this case shock the conscience to such a degree that a writ is appropriate. Furthermore, it is appropriate for two additional reasons; (1) the lower federal courts need to be reminded of the restraint on their power within the judiciary, and to be cautioned against unsurping the power of the jury; and (2) the public needs to be reassured that not only its constitutional right to trial by jury is being protected by the Supreme Court, but also that its power to decide issues of fact is not being eroded by the federal courts.

The Supreme Court has, in the past, granted writs to review Seventh Amendment violations. In considering a petition in a Federal Employer's Liability Act (FELA) case, the Supreme Court held, "It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case." *Wilkerson v McCartny,* 336 U.S. 53, 55 (1949). In *Wilkerson,* an action was brought for personal injuries sustained as a railroad employee. A directed verdict was entered for the defendant and the State Supreme Court affirmed. After granting *certiorari the United States Supreme Court* reversed, and held that in many previous cases it had ruled that where jury trials are required, courts must submit issues on negligence to a jury if evidence might justify either way on those issues. *Lavender v Kurn,* 327 U.S. 645 (1946); *Bailey v Central Vermont Ry.,* 319 U.S. 350 (1943); *Jones v East Tennessee V. & G. R. Co.,* 128 U.S. 443 (1888).

In *Beacon Theatres v Westover,* 359 U.S. 500 (1959), an antitrust case, the Court held that certiorari was granted to review the alleged Seventh Amendment violation because the "... Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the upmost care." 359 U.S. at 501.

In *Atlantic and Gulf Stevedores, Inc. v Ellerman Lines, Ltd.,* 369 U.S. 355, *rehearing denied* 369 U.S. 882 (1962) an employee sustained personal injuries and sued the owner of a vessel on which he was working. Jurisdiction was based on diversity of citizenship. The owner-defendant brought in the employer and alleged that their negligence was a defense to any action against it by the plaintiff-employee. In this case the employee's right leg had to be amputated. A jury awarded $100,000.00 to the employee, and held that

there was no negligence on behalf of his employer. The vessel owner than appealed to the Court of Appeals, which affirmed the judgment for the plaintiff but reversed the jury's decision against the employer. The Supreme Court granted certiorari, and stated as follows:

> We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the district court can predetermine them for the Seventh Amendment says that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." 369 U.S. at 358.

The Supreme Court held that by reason of diversity of citizenship the right to trial by jury was carried with the case and an alleged violation was a proper grounds for review. It cited *Byrd v blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) for the proposition that the Seventh Amendment fashions a federal policy favoring jury decisions of disputed fact questions. It went on to state that a search for one possible view of the case which makes the jury's finding inconsistent results in a collision with the Seventh Amendment. Accordingly, the decision of the federal appellate court was reversed.

Questions of negligence, whether primary or contributory, are ordinarily for the jury to decide. *See Harner v John McShain, Inc. of Maryland,* 394 F.2d 480 (4th Cir. 1968). The Fourth Circuit has also held that whether a question of negligence is one for the court or the jury is a question of federal practice and is governed by federal and not state decisions. *Burcham v J.P. Stevens Co.* 209 F.2d 35 (4th Cir. 1954). In a diversity of citizenship case there is no question

that federal standards control when considering the sufficiency of the evidence presented to a jury. *Wratchford v S.J. Groves & Sons Co.* 405 F.2d 1061 (4th Cir. 1969) The *Wratchford* case held that if, from the evidence, competing inferences arise, one or more of which might be the basis for a factual decision supporting liability, and one or more which might not, the case must be left to the jury under appropriate instructions.

In considering the motion for judgment n.o.v., the federal court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. *Barrett v Robinson,* 65 F.R.D. 652 (E.D.Pa. 1975); *Wright and Miller, Federal Practice and Procedure:* Civil §2524 (1971). The credibility of witnesses who testified at the trial is for the jury and not the court. *Jackson v Denno,* 378 U.S. 368 (1964). Furthermore, issues concerning negligence and contributory negligence are mixed questions of law and fact. The ultimate answer to such questions must come from the jury, under proper instructions from the judge. *Tucker v Spalding,* 80 U.S. 453 (1871).

The Supreme Court has held that where fair-minded men might reach different conclusions on the question of negligence, this question should be left to the jury. "The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence." *Bailey v Central Vermont Ry.,* 319 U.S. 350, 353 (1943). Where the inference drawn from a jury had support in evidence that a railroad negligently caused a fatal accident a judgment notwithstanding the verdict would be improper as a deprivation to the plaintiff of his Seventh Amendment right to trial by jury. *Tennant v Peoria and P.U.Ry. Co.,* 321 U.S. 29 (1944).

In the case *sub judice* the district court has substituted its judgment of the facts for that of the jury, and has determined that Mr. Singleton should have seen the utility wires and that he failed to act reasonably when unloading his truck. In order to reach such a conclusion it had to weight the credibility of witnesses, particularly because there was a conflict in the testimony. When such a conflict exists, and the district court nevertheless imposes its will on the jury, the federal court has usurped the power of the jury and has violated the Seventh Amendment.

The jury in *Singleton* heard six days of testimony, heard the arguments of counsel concerning negligence and contributory negligence, and was properly instructed on the law. It collectively weighed the credibility of the witnesses who testified. It diligently and competently went about its duty as charged by the court, in determining the fact issues of negligence and causation. It thereafter rendered a verdict in the amount of one million dollars ($1,000,000.00) in compensatory damages for the injuries sustained by Mr. Singleton, and even the trial court stated that such damages were "clearly not excessive."

The jury in *Singleton* has, in effect, been told by the district court that it has performed its duty in a careless fashion, and that no fair-minded men could have reached the conclusion that this jury reached. We could not disagree more strongly with such a conclusion. No jury makes an award lightly, and certainly no jury would award one million dollars ($1,000,000.00) in damages unless it collectively believed that the evidence justified such an award. This jury, as well as the public, was no doubt shocked that the six days it spent in federal court and the time that it spent in its deliberations were apparently in vain.

In the case *sub judice* conflicting testimony and various inferences to be drawn from that testimony were obvious.

That such a case was taken from the jury rightfully shocks the consicence of the public at large and the jury that deliberated in this matter. It has violated the petitioner's Seventh Amendment constitutional right to a trial by jury. We respectfully request that the Supreme Court grant the petitioner's writ of certiorari, not only to review and hopefully correct an injustice, but more importantly to protect and reaffirm the constitutional right to a jury trial for all citizens of the United States.

2. The Fourth Circuit has failed to follow a controlling decision of another panel within its circuit, and requires the exercise of this Court's power of supervision.

When Mr. Singleton petitioned the Fourth Circuit to rehear the case and suggested a rehearing *en banc,* he pointed out to the Fourth Circuit that there appeared to be a conflict between the decision in his case and a prior controlling decision. It asked the Fourth Circuit to consider the *Singleton* case *en banc* in order to maintain uniformity of its decisions. Without comment, this suggestion was denied.

On May 10, 1982 the Fourth Circuit handed down an unpublished decision in *Keller v Virginia Electric and Power Co.,* No. 81-2199, which involved a dump truck driver who was electrocuted by elevating his dump bed into overhead uninsulated utility wires. The driver had attempted to dump out water which had accumulated in his trailer bed at a nondesignated dumping site. He had pulled his truck underneath high voltage utility wires and then hydraulically lifted up the trailer to dump out the water. The edge of the trailer came in contact with the wires and he sustained severe injuries. He had been on the premises on nine previous occasions and was familiar with the surroundings, and voluntarily selected the dumping area. He also acknowledged that he had seen the wires prior to dumping.

At the trial the presiding judge overruled Vepco's motion for a directed verdict based on contributory negligence, and allowed the case to proceed. The jury, after careful deliberation, found that the plaintiff was guilty of contributory negligence and denied recovery. The plaintiff appealed the jury verdict the Fourth Circuit affirmed, holding that "...the case was fairly tried and fairly submitted to the jury."

The *Keller* case was not mentioned in the *Singleton* opinion, which was handed down several months later (February 7, 1983) notwithstanding the conflict between these two decisions. On the one hand a case of contributory negligence was allowed to be submitted to the jury, and that decision was affirmed on appeal. The facts of that case strongly suggested that Mr. Keller was contributorily negligent, and even though his negligence was much greater than that attributable to Mr. Singleton, the Fourth Circuit nevertheless held that his case had been fairly submitted to the jury, notwithstanding the implications of contributory negligence.

On the other hand, when the jury was allowed to weigh the conflicting testimony of the witnesses in the *Singleton* case and to judge the credibility of Mr. Singleton and opposing experts, and thereafter allowed to draw reasonable inferences based upon that testimony, the Fourth Circuit held that the case should never have gone to the jury, based on contributory negligence as a matter of law. These two decisions are clearly in conflict.

One panel of a circuit court cannot disregard the precedent set by a prior panel, even though it may conceive error in the prior decision. Absent an overriding Supreme Court decision or a change in the statutory law, only the court *en banc* can disregard prior case law. *Davis v. Estelle,* 529 F.2d 437 (5th Cir. 1976); 9 *Moore's Federal Practice,*

§235.02, p. 35-5, n. 3 (1982). A more recent case, *LeVick v. Skaggs Co., Inc.*, 701 F.2d 777 (9th Cir. 1983) has reaffirmed that absent the convening of an *en banc* panel, or subsequent Supreme Court decisions overruling a prior decision, the holding of a prior panel would be controlling authority within the circuit.

The Fourth Circuit has attempted to ignore its responsibilities in this regard in two ways: (1) by not publishing its decisions in certain cases which potentially concern Seventh Amendment violations, thus avoiding widespread knowledge of such conflicts, and (2) by not fully discussing and therefore failing to respond to the issues raised in the appellants' briefs. The summary fashion in which the Fourth Circuit entered its opinion in the *Singleton* case and the *Keller* case also reinforces the petitioner's contention that the Fourth Circuit has refused to address errors of law, but instead has merely weighed the evidence as a jury. It is not the appellate court's function to weigh the credibility of witnesses and draw inferences which favor one side or another.

The Supreme Court has broad supervisory power over the lower courts. *United States v Munsingwear,* 340 U.S. 36 (1950). The petitioner respectfully prays the Supreme Court to exercise that supervisory power to remedy the conflict between the cases in the Fourth Circuit and to insure uniformity of the appellate process in reviewing potential Seventh Amendment cases.

VII. CONCLUSION

For the above-cited reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted this 14th day of June, 1983.

LEONARD T. JERNIGAN, JR.
MICHAELS & JERNIGAN
Cooper Square
17 Glenwood Avenue
Raleigh, North Carolina 27603

and

MOODY, STROPLE, BRAHM
& LAWRENCE, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705-1138

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ELMER H. SINGLETON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 81-10
	)	
VIRGINIA ELECTRIC AND POWER COMPANY, et al,	)	
	)	
Defendants)		

ORDER

This day came the parties, by counsel, on VEPCO's motion for judgement notwithstanding the verdict or, in the alternative, for a new trial. It appearing to the court from the briefs of the parties, hereby made a part of the record, and from the argument of counsel that judgement notwithstanding the verdict should be granted for VEPCO and that, if reversed on appeal a new trial will be required, all for the reasons stated on the record in open court, Wherefore, it is hereby.

ORDERED that VEPCO's motion for judgement notwithstanding the verdict is granted and that VEPCO's motion for a new trial is conditionally granted in the event that the judgement for VEPCO is reversed.

Walter E. Hoffman
United States District Judge

Norfolk, Virginia
February 23, 1982

****

United States Court of Appeals

FOR THE FOURTH CIRCUIT

Unpublished

No. 82-1231

Elmer H. Singleton,

Appellant,

v.

Virginia Electric and Power Company,
a Virginia Corporation,

Appellee,

and

Arthur J. Lancaster, Jr., d/b/a
Bennett's Creek Wholesale Nursery;
Mildred L. Lancaster, d/b/a,
Bennett's Creek Wholesale Nursery
and Colemen Nursery, Incorporated,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, Senior District Judge.

Argued December 6, 1982 Decided February 7, 1983

Before WINTER, Chief Judge, ERVIN, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

Russell N. Brahm, III, Raymond H. Strople (Willard J. Moody, Moody, Strople, Brahm & Lawrence, Ltd.; Leonard T. Jernigan, Jr., Paul J. Michaels, Michaels & Jernigan on brief) for Appellant; G. H. Gromel, Jr. (Matthew J. Calvert, Hunton & Williams on brief) for Appellee.

PER CURIAM:

In this diversity action for personal injuries, the district court granted defendant judgment n.o.v. on the ground that plaintiff was contributorily negligent as a matter of law. Plaintiff, a truck driver, was severely injured when he undertook to empty a dump truck in a dumping area under high voltage electric wires owned and maintained by defendant. When the truck was raised, it made contact with wires and plaintiff's injuries resulted. It was plaintiff's theory that defendant was negligent in maintaining and permitting the electric wires to exist over a dumping area.

We affirm. From our examination of the record and consideration of the briefs and oral argument, we, too, are persuaded that plaintiff was guilty of contributory negligence as a matter of law, thus barring recovery by him under Virginia law. *See,* Watson v. Virginia Electric & Power Co., 199 Va. 570, 100 S.E.2d 774 (1957).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 82-1231

Elmer H. Singleton,

Appellant,

versus

Virginia Electric and Power Company,
a Virginia Corporation,

Appellee,

and

Arthur J. Lancaster, Jr., d/b/a
Bennett's Creek Wholesale Nursery;
Mildred L. Lancaster, d/b/a,
Bennett's Creek Wholesale Nursery
and Coleman Nursery, Incorporated,

Defendants.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Chief Judge Winter for a panel consisting of Chief Judge Winter, Judge Ervin, and Judge Haynsworth.

For the Court,

Filed
March 16, 1983
U.S. Court of Appeals
Fourth Circuit

/s/ William K. Slate, II
CLERK

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 81-2199

Allen E. Keller,

Appellant,

versus

Virginia Electric & Power Company and Davis Grain Corporation,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Argued April 2, 1982 Decided May 10, 1982
Before HAYNSWORTH, Senior Circuit Judge, WIDENER and CHAPMAN, District Judges.

Louis B. Fine, Lewis Allen (John R. Lomax, Fine, Fine, Legum & Fine on brief) for Appellant; R. Kenneth Wheeler (Douglas W. Davis, Michael D. Tryon, Hunton & Williams on brief) and William B. Eley (Willcox, Savage, Dickson, Hollis & Eley, P.C. on brief) for Appellee.

PER CURIAM:

The plaintiff sought damages from Virginia Electric & Power Company and Davis Grain Corporation for personal injuries he sustained, but the verdict of the jury went against him as to both defendants.

Keller drove a large, grain hauling tractor-trailer. The trailer was thirty feet long and was equipped with hydraulic lifts for dumping. Because there had been rain the night before, there was water on the floor of the trailer which Keller wished to dump before taking on a load of grain. he

chose a site on the premises of Davis Grain above which electric lines had been strung by Vepco 21.6 feet above the ground. There Keller opened the tailgate and activated the hydraulic lift until the rising forward edge of the trailer contacted the power lines, severely injuring Keller who was in contact with the truck.

The action was defended by each of the defendants on the ground that it was not negligent and upon the ground that the plaintiff was guilty of contributory negligence..

On appeal, the plaintiff complains of evidentiary rulings and of the court's instruction to the jury. After full consideration, however, we are satisfied that the case was fairly tried and fairly submitted to the jury. We find no reversible error.

AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 1983, three (3) copies of the petition for writ of certiorari were mailed, postage prepaid, to Mr. G.H. Gromel, Jr. and Mr. Matthew J. Calvert, of HUNTON & WILLIAMS, P.O. Box 1535, Richmond, Virginia 23212, counsel for the respondent. I further certify that all parties required to be served have been served.

LEONARD T. JERNIGAN, JR.
MICHAELS & JERNIGAN
Cooper Square
17 Glenwood Avenue
Raleigh, North Carolina 27603

and

MOODY, STROPLE, BRAHM
& LAWRENCE, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705-1138

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No. 82-2053

In The

Supreme Court of the United States

October Term, 1982

ELMER H. SINGLETON,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

G. H. GROMEL, JR.
Counsel of Record

G. H. GROMEL, JR.
MATTHEW J. CALVERT
Hunton & Williams
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

Counsel for Respondent

QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals properly affirm the trial court's entry of judgment notwithstanding the verdict for Virginia Electric and Power Company?

2. Has the Fourth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE[1]

Virginia Electric and Power Company (Vepco)[2] notes several inaccuracies and omissions in the Petitioner's Statement of the Case. The Petition for Writ of Certiorari (the Petition) fails to mention that the trial court granted co-defendant Arthur J. Lancaster, Jr.'s Motion for Directed Verdict on the ground that Lancaster, as a landowner, had

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[1] References to the record for this case shall be made to the pages of the Joint Appendix filed in the Fourth Circuit Court of Appeals.

[2] In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, Vepco notes that its parent corporation is Dominion Resources, Inc. and its sole affiliate is Dominion Resource Services, Inc.

no duty to warn Elmer H. Singleton of Vepco's overhead electric lines at the nursery because the lines were open and obvious. Moreover, the trial court did not rule, as the Petition states, that a jury issue existed as to Singleton's contributory negligence. As is obvious from the trial court's ruling on Vepco's Motion for Judgment Notwithstanding the Verdict, the trial court found that Singleton was contributorily negligent as a matter of law and, therefore, barred from recovery under controlling Virginia law.

The Petition also fails to mention that the trial court, pursuant to Rule 50(c) of the Federal Rules of Civil Procedure, granted conditionally Vepco's motion in the alternative for a new trial on the grounds that the jury's findings that Vepco was negligent and that Singleton was not contributorily negligent were "overwhelmingly contrary to the evidence and law, as instructed by the court." 19A.

Vepco does not take issue with the facts set forth in the Petition, but will point out other pertinent evidence in its Argument.

SUMMARY OF ARGUMENT

This diversity of citizenship case exclusively involves Virginia's substantive law of negligence and contributory negligence. The judgment entered by the trial court was fully in accord with controlling decisions of the Virginia Supreme Court, Rule 50 of the Federal Rules of Civil Procedure, and pertinent decisions of this Court regarding the Seventh Amendment of the United States Constitution. The Fourth Circuit Court of Appeals carefully considered and properly rejected, in its per curiam opinion, Singleton's contention that the trial court erroneously granted Vepco's motion for judgment notwithstanding the verdict. Signifi-

cantly, no judge of the Fourth Circuit requested a poll on Singleton's suggestion for rehearing en banc and, accordingly, the petition for rehearing properly was denied. Clearly, no special or important reason exists for the issuance of a writ of certiorari.

ARGUMENT

Counsel for Singleton ask this Court to review a decision of the Fourth Circuit that turned exclusively on a finding that Singleton was contributorily negligent as a matter of law under controlling Virginia law in carelessly raising the trailer of his dump truck into plainly visible overhead power lines. Singleton's counsel, having failed to persuade either the trial court or the Fourth Circuit that the evidence, when viewed most favorably to him, created a jury issue as to his contributory negligence, now seek a writ of certiorari on the grounds that (i) entry of judgment notwithstanding the verdict for Vepco violated Singleton's Seventh Amendment rights and (ii) the Fourth Circuit "has attempted to ignore its responsibilities"[3] by failing to follow controlling precedent in that circuit and by not discussing fully arguments raised on appeal. These contentions are patently without merit and the Petition should be denied.

1. Vepco Properly Was Granted Judgment Notwithstanding The Verdict

Singleton's counsel contend that the trial court's refusal to uphold the jury's verdict constitutes a deprivation of Singleton's Seventh Amendment rights. Singleton's counsel do not maintain that the procedure set forth in Rule 50(b) of the Federal Rules of Civil Procedure for entry of judg-

[3] Petition at 14.

ment notwithstanding the verdict violates the Seventh Amendment. Such an argument is precluded, of course, by this Court's rulings that the federal procedure for entry of judgment notwithstanding the verdict clearly is consistent with the Seventh Amendment and the Rules of the Common Law. *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 321 (1967); *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 659-60 (1935). Thus, Singleton's argument is simply that the evidence raised a jury question as to whether he was contributorily negligent.

In this diversity case, the substantive law of Virginia controls whether Singleton was contributorily negligent. *Harner* v. *John McShain, Inc.*, 394 F.2d 480, 481 (4th Cir. 1968); *Burcham* v. *J. P. Stevens & Co.*, 209 F.2d 35, 40 (4th Cir. 1954); *see Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Singleton's counsel ignore this principle and argue that federal rather than state standards determine whether the evidence supports the jury's conclusion that Singleton was not contributorily negligent.[4] The argument, however, is irrelevant in a case such as this where the federal and state tests of the sufficiency of the evidence are identical. *See* 9 Wright & Miller, *Fed. Prac. & Pro.* § 2525, at 549-51.

Under both federal and Virginia law, when the evidence viewed in the light most favorable to Singleton will not support the reasonable inference that Singleton exercised ordinary care for his own safety, contributory negligence becomes a question of law for the court. *Compare Burcham*

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[4] This Court has never resolved the question whether, in a diversity case, state or federal standards determine whether evidence is sufficient to support a jury verdict. *See Wetzel* v. *Eaton Corp.*, 62 F.R.D. 22, 25 (D. Minn. 1973) (citing *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 444-45 (1959)); 9 Wright & Miller, *Fed. Prac. & Pro.* § 2525, at 549-51.

v. *J. P. Stevens & Co.*, 209 F.2d at 37, *with Smith* v. *Virginia Electric and Power Co.*, 204 Va. 128, 132, 129 S.E.2d 655 (1963). *See also Galloway* v. *United States*, 319 U.S. 372, 373, 386-88 (1943); *Virginia Electric and Power Co.* v. *McCleese*, 206 Va. 127, 133, 141 S.E.2d 755 (1965). Here, the evidence, when considered in the light most favorable to Singleton, conclusively established that he failed to look for and see power lines that were in plain view and that he knew could injure him. Therefore, contributory negligence was a question of law for the trial court.

Under these circumstances it was not only the right, but the duty of the trial court to enter judgment for Vepco. *See Bowditch* v. *Boston*, 101 U.S. 16, 18 (1879). The exercise of the trial court's vital control over the jury's verdict in this case was consistent with Rule 50(b), was required by the substantive law of Virginia, and was necessary to avoid a miscarriage of justice. *Garrison* v. *United States*, 62 F.2d 41, 42 (4th Cir. 1932); *cf. Turner* v. *Atlantic Coast R.R.*, 292 F.2d 587, 589 (5th Cir. 1961).

Under Virginia law two elements are necessary to establish that a person injured by contacting overhead power lines was contributorily negligent as a matter of law. First, the person, or a reasonable person in the same circumstances, must have recognized some danger in contacting overhead power lines by means of the instrumentality under his control at the time of the accident. Second, the power lines contacted must be open and obvious. *See Smith* v. *Virginia Electric and Power Co.*, 204 Va. 128, 129 S.E.2d 655 (1963); *Watson* v. *Virginia Electric and Power Co.*, 199 Va. 570, 100 S.E.2d 774 (1957). The evidence in this case established both elements conclusively.

The Virginia Supreme Court long has recognized that the danger of electrical energy is a matter of common

knowledge to all persons of ordinary intelligence and experience and that all competent persons are well aware that any line carrying electrical current is potentially harmful. *See Watson* v. *Virginia Electric and Power Co.*, 199 Va. at 575, 100 S.E.2d at 778. The dangers of electricity need not have been imputed, however, to Singleton. He testified unequivocally that he appreciated the dangers of electricity. 218A-19A. He admitted knowing that he could be injured if he contacted the power lines at the nursery as the following testimony at trial reveals:

> [Counsel for Vepco]: And if you had seen those power lines at the nursery on the day of the accident you would not have tried to raise your trailer?
>
> [Mr. Singleton]: No Way.
>
> [Counsel for Vepco]: Why is that?
>
> [Mr. Singleton]: Because all the way down the line I had hear'd how dangerous that could be and how other drivers had been hurt and no way I would dump against a power line.
>
> [Counsel for Vepco]: Because you would be injured; isn't that true?
>
> [Mr. Singleton]: Yes, sir.

218A-19A.

In addition to demonstrating conclusively that Singleton was aware of the danger presented to the operator of a dump trailer by overhead power lines such as those at the nursery, the evidence proved, as a matter of law, that the power lines at the nursery were open and obvious. Numerous photographs admitted into evidence and the testimony of all witnesses conclusively established that the power lines contacted by Singleton were unobstructed and plainly visible to

any person exercising ordinary care for his own safety. Singleton's counsel, however, say a jury question existed on this issue. They argue that because Singleton says he looked toward the pine bark mixing area before deciding to unload the bark, and did not see the overhead power lines, a jury question existed as to his credibility and the visibility of the lines.

Whether Singleton testified that he saw the lines or not is not the question under Virginia law. The question is whether the lines should have been seen by an experienced truck driver who intended to raise a dump trailer over 27 feet in the air and who knew he could be injured by contacting those lines. When examined in the light most favorable to Singleton, the evidence conclusively showed that any reasonable person in the same circumstances would have seen the lines before fully elevating the 28-foot dump trailer.

When Singleton arrived at the nursery on the day of the incident he was well aware of the need to be cautious while operating the truck and dump trailer and knew he could be injured by contacting overhead power lines with the trailer. 190A-91A & 218A-19A. Although he had never been on the nursery's premises before, by his own admission he "never drove into an area that I was new to without being sure that I could do the job. . . ." 171A-72A. Singleton drove into the nursery's premises alongside Vepco's utility poles and power lines, parked his truck, and then walked directly beneath the power lines in question. After finding no one at the nursery to receive the bark, he returned to his truck and backed the truck onto a concrete slab used by the nursery to store pine bark. At that location the power lines were approximately 23 feet overhead. Singleton then got out of the cab of the tractor to release the tailgate lever on the dump trailer. While preparing to raise a potentially

dangerous instrumentality over 27 feet in the air Singleton, by his own admission, did not look overhead and see the plainly visible power lines. 237A. Instead, he simply returned to the truck and raised his trailer into the power lines.

Singleton's testimony that he looked for, but did not see any power lines before backing his truck onto the concrete slab must be viewed in light of his unequivocal testimony that he saw the lines with no difficulty when he returned to the nursery several months after the accident.

> [Counsel for Vepco]: When you went back out to the accident site you saw the power lines, didn't you?
>
> [Mr. Singleton]: Yes, sir, when I went back out there in May [1979], I was aware of the fact that the lines were already there.
>
> [Counsel for Vepco]: And you had no trouble seeing the power lines?
>
> [Mr. Singleton]: No, I went out there to look for them and at them.
>
> [Counsel for Vepco]: And you went directly to the point of the accident?
>
> [Mr. Singleton]: Before I left the accident area, yes, sir.
>
> [Counsel for Vepco]: And when you stood at that point and looked up you had no trouble seeing those lines, did you?
>
> [Mr. Singleton]: No, sir, I was looking for them.

206A-07A. In view of this evidence and the testimony of every other witness who visited the nursery that the lines

were plainly visible there clearly was no doubt that the lines were open and obvious under Virginia law.[5]

Both the trial court and the Fourth Circuit have carefully combed the record, including Singleton's testimony, and have examined the evidence, and all reasonable inferences that can possibly be drawn therefrom, in the light most favorable to Singleton. Still, applying this strict scrutiny, these courts have concluded that Singleton was contributorily negligent as a matter of law. Sympathy for Singleton's serious injuries is strong in this case, but the Fourth Circuit and the trial court carried out their paramount duty to maintain the integrity of the substantive state law. *See Turner* v. *Atlantic Coast Line R.R.*, 292 F.2d 586, 589 (5th Cir. 1961). These courts could not properly have allowed the jury's verdict to stand without rendering meaningless the defense of contributory negligence under Virginia law. Accordingly, Vepco was entitled to judgment notwithstanding the verdict.

2. The Fourth Circuit Has Not Disregarded Controlling Precedent

Singleton also has argued that a writ of certiorari should be granted because the Fourth Circuit's per curiam decision was inconsistent with its earlier per curiam decision in *Keller* v. *Virginia Electric and Power Co.*, No. 81-2199 (4th Cir. May 10, 1982). Although the facts in *Keller* were

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[5] As the trial judge observed:

> I do think that it is undisputed by this evidence that these lines were open and obvious in the sense that had anyone looked from the ground up that person would have seen these lines. That is to say no weather conditions, no bright sun that blocked anybody's view, it was no storm. It was overcast but that is the extent of it. Cold weather wouldn't make any difference. I can't help but conclude that in fact it was open and obvious.

268A-69A.

similar to the facts in this case, in no way can the Fourth Circuit's decision in this case be construed as inconsistent with the holding in *Keller*.

The Fourth Circuit's decision in *Keller* summarily affirmed the entry of judgment for Vepco in accordance with a jury verdict. The contention that the jury verdict in *Keller* was based on a finding that the plaintiff in that case was contributorily negligent is mere speculation. Furthermore, that the Fourth Circuit remarked in affirming the trial court's judgment in *Keller* that "the case was fairly tried and fairly submitted to the jury," cannot possibly be interpreted as controlling precedent regarding Virginia's doctrine of contributory negligence or the standard in the Fourth Circuit for reviewing a motion for judgment notwithstanding the verdict. These issues were not addressed by the Fourth Circuit in *Keller*.

Singleton's contention that a conflict exists between the unpublished per curiam decision of the Fourth Circuit in this case and the earlier unpublished per curiam decision of the Fourth Circuit in *Keller* is absurd. The argument was raised in Singleton's petition for rehearing en banc and was rejected by the Fourth Circuit. Obviously, the Fourth Circuit's action in this case is not a departure from "the accepted and usual course of judicial proceedings" within the meaning of Rule 17.1(a) of the Rules of the Supreme Court. Furthermore, the alleged conflict between the Fourth Circuit's decision in this case and in *Keller* is not a conflict between federal courts of appeals within the meaning of Rule 17.1(a). Thus, there clearly is no reason for this Court, in the exercise of its discretion, to grant a writ of certiorari.

CONCLUSION

The Fourth Circuit properly affirmed the trial court's judgment notwithstanding the verdict for Vepco on the ground that Singleton was contributorily negligent as a matter of law under the law of Virginia. Moreover, neither this Court's policy of insuring wise judicial administration nor its practice of resolving conflicts among the federal courts of appeals justifies a grant of a writ of certiorari in this case.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY

By: G. H. GROMEL, JR.
Counsel of Record

G. H. GROMEL, JR.
MATTHEW J. CALVERT
Hunton & Williams
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that in compliance with Rule 28.3 of the Rules of the Supreme Court of the United States, three copies of the foregoing Brief in Opposition were deposited in a United States mailbox on July 15, 1983, with first-class postage prepaid, addressed to Leonard T. Jernigan, Jr., counsel of record for Petitioner, at Michaels & Jernigan, Cooper Square, 17 Glenwood Avenue, Raleigh, North Carolina 27603.

G. H. GROMEL, JR.

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Leonard T. Jernigan, Jr.
MICHAELS & JERNIGAN
Cooper Square
17 Glenwood Avenue
Raleigh, North Carolina 27603

and

MOODY, STROPLE, BRAHM
& LAWRENCE, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705-1138

Counsel for Petitioner

DiCesare and Associates Printing • Washington, D.C. • (202) 331-8101

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The Respondent, Virginia Electric and Power Company (Vepco), has consistently referred to Virginia law to support its position. However, the Virginia Supreme Court has recently discussed the issue of contributory negligence in an electrocution case where the alleged negligence of the Plaintiff was much greater than that attributable to the petitioner in the case *sub judice*, yet has held that this issue should be resolved by the jury. The Respondent has failed to bring this case to the Court's attention. Other objections to the brief[1] will be cited in the body of this Reply.[2]

[1]References to the record for this case shall be made to the Appendix filed with the Fourth Circuit.

[2]For example, the Respondent has commented that the Petitioner incorrectly stated that the trial court ruled that a jury issue existed as to Singleton's negligence (Respondent's Brief, p 2). We quote the trial court:

> With those comments I will merely let the case go forward to the jury on both the issues of primary negligence on the part of the Power Company and contributory negligence on the part of Mr. Singleton.

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ARGUMENT

1. RECENT VIRGINIA LAW SUPPORTS PETITIONER.

Three (3) days after the Petition was filed the Virginia Supreme Court handed down its decision in *Vepco v. Winesett*, ____ Va.____, 303 S.E. 2d 868 (1983).[3] Although the Petitioner cited this case,[4] and counsel for Respondent was also counsel in the *Winesett* case, the Brief in Opposition omits any reference to this decision. Such an ommission runs contrary to the admonition of Chief Justice Burger that the Court "...must rely on counsel to present issues fully and fairly and counsel have a continuing duty to inform the Court of *any* development which may conceivably affect an outcome."[5] (emphasis added).

In *Winesett* the administrator of James Woodrow Winesett filed an action against Vepco, alleging that Vepco's negligent operation and maintenance of distribution wires had caused Mr. Winesett's death by electrocution while he was trimming a tree on private property. Branches of this tree had grown through utility wires maintained by Vepco. The owner, Mr. Robert Carl, had telephoned Vepco and reported the problem of a possible electrical hazard, but no action was taken. Mr. Carl then decided to remove the tree at his own expense, and hired Mr. Winesett to do the job. He did not discuss directly with Winesett the existence of the power lines, or mention any "sparking" problems.

Winesett and a helper, Thomas P. McClennan, attempted to cut down the tree. Neither had knowledge that the lines running through the tree were uninsulated high-voltage lines, although they had seen the wires. They were concerned that they might break the wires, and therefore

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[3]The Petition was filed on June 14, 1983; *Winesett* was decided on June 17, 1983.

[4]Petition, p 4.

[5]*Fusari v Steinberg*, 419 U.S. 379, 391 (1974).

attempted to trim the branches to avoid the wires being hit by tree limbs. Winesett climbed an aluminum ladder and began trimming branches with an electric chain saw. After about half an hour, McClennan heard Winesett scream, "Unplug the saw." Each time McClennan touched the ladder or the legs of Winesett he received an electrical shock, and Winesett eventually fell from the tree and died from cardiac arrest caused by electrocution. The last branch cut by Winesett had made contact with a high-voltage utility wire near the tree, thereby conducting electrical current through the tree, electrocuting Winesett.

The jury found that Vepco was negligent and that Winesett was free of contributory negligence, and awarded damages in the amount of $182,796.00. The trial court denied Vepco's motion for judgment notwithstanding the verdict, and Vepco appealed to the Virginia Supreme Court. It argued that the evidence showed "conclusively" that Winesett was contributorily negligent as a matter of law. Just as in the Brief in Opposition filed with this Court, it relied on *Watson v Vepco*, 199 Va. 570, 100 S.E.2d 774 (1957).[6]

The Virginia Supreme Court has rejected Vepco's arguments. It reaffirmed that as a general rule contributory negligence is a jury issue, and that at the trial level Vepco had the burden of proving contributory negligence. The Court then stated as follows:

> On appeal, however, Vepco has the heavier burden of showing "that there is no conflict in the evidence of contributory negligence, and that there is no direct

---

[6]The trial judge in the *Singleton* case admittedly based his Order on *Watson*. "I must grant the motion pursuant primarily to the *Watson* case decided by the Virginia Supreme Court..." 19A

> and reasonable inference to be drawn from the evidence as a whole, sustaining the conclusion that. . .[plaintiff's decedent] was free of contributory negligence."[7]

The Virginia Supreme Court cited with approval the case of *Vepco v Mabin*, 203 Va. 490, 125 S.E.2d 145 (1962), where it affirmed the trial court's decision that the plaintiff was not contributorily negligent as a matter of law where he received injuries while crawling under high-voltage utility wires as he worked on a roof. The court noted that the evidence and the testimony of the plaintiff himself was in question, and that reasonable minds could differ as to the effect of the plaintiff's testimony, thus precluding contributory negligence as a matter of law.

In the case *sub judice*, when the petitioner became aware of the pending *Winesett* case, it was brought to the attention of the Fourth Circuit.[8] Mr. Singleton requested the Fourth Circuit to withhold its final judgment, and stated: "If in June of 1983 the Virginia Supreme Court holds that under Virginia law Mr. Winesett was free of contributory negligence as a matter of law, how can it then be said that Mr. Singleton was not likewise free."[9] Nevertheless, the Fourth Circuit refused to await a clarification of the Virginia law and denied the Petition to Rehear.

The argument contained in the Respondent's brief relies almost exclusively on its own interpretation of Virginia law. It refers to Virginia law no less than nineteen (19) times in its eleven (11) page brief, and cites the same two cases specifically rejected by the Virginia Supreme Court in the *Winesett* case.[10] Although the respondent has placed heavy emphasis on the substantive law of Virginia concerning

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[7] *Winesett, supra*, 303 S.E.2d at 872.

[8] Petition to Rehear, p 3.

[9] Petition to Rehear, p 6.

[10] **See** *Winesett, supra*, 303 S.E.2d at 872, where the court stated that Vepco relied principally on *Smith v Vepco*, 204 Va. 128, 129 S.E.2d 655 (1963), and *Watson v Vepco*, 199 Va. 570, 100 S.E.2d 774 (1957).

contributory negligence as a matter of law, it has failed to mention the most significant case on this issue.

In light of *Winesett*, the Respondent must now concede that Virginia law gives no support to its position. Whatever ambiguity existed, if any, in the substantive law of Virginia concerning contributory negligence has now been decided in Mr. Singleton's favor, and gives compelling weight to his Petition. At the trial court, the Fourth Circuit, and now the Supreme Court, the Respondent has consistently claimed that Virginia law supported its position. This claim is no longer justified. Virginia law has reaffirmed the long-standing principle that the jury is the best judge of credibility and the reasonableness of a plaintiff's actions, and that where the minds of reasonable men could differ as to this issue its determination should remain in the hands of the jury.

2. EVIDENCE MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF.

The Respondent has acknowledged that the federal standard of review in diversity of citizenship cases requires that the evidence must be viewed in the light most favorable to the Plantiff.[11] Nevertheless, it then proceeded to supply facts and inferences that support the position of the Respondent, not that of Mr. Singleton. Whether the uninsulated wires were in plain view was a vigorously contested issue at the trial, yet the Respondent states that the wires were in "plain view"[12] and that photographs and testimony of "all witnesses" established that such lines were plainly visible.[13] It freely substitutes its opinion for that of the jury. A determination of this fact was soley within the province of the men and women who heard the testimony

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[11]Respondent's Brief, p 4.
[12]Respondent's Brief, p 5.
[13]Respondent's Brief, p 6.

and weighed the evidence, and judged the credibility of the witnesses. In short, the Respondent has refused to view the facts in the light most favorable to the Plaintiff, and has put forth selected portions of the transcript which favor its position.

Nevertheless, contrary to the assertions of the Respondent, there were witnesses who gave inferences to the jury that these lines were not open and obvious. Even the landowner, Arthur J. Lancaster, Jr.,[14] when shown a photograph of the wires against a cloudy sky, admitted that they could be dificult to see:

> [Counsel for Singleton]: You see these wires here very clearly?
> [Mr. Lancaster]: Yes, sir.
> [Counsel for Singleton]: You see that wire there very clearly?
> [Mr. Lancaster]: No, I can't see that one right there.
> [Counsel for Singleton]: That blends right through the clouds?
> [Mr. Lancaster]: I don't know.
> [Counsel for Singleton]: You want me to hold it closer?
> [Mr. Lancaster]: I can't see the wire, but don't forget that is a picture.
> [Counsel for Singleton]: That would show you that it's possible these could blend in with the clouds?
> [Mr. Lancaster]: I see that, but as I say it's a picture. It could have been poor photography.

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[14]Mr. Lancaster was initially a defendant in the lawsuit. The trial judge entered a directed verdict in his favor at the close of the Plaintiff's evidence, but this judgment was not brought forward on appeal to the Fourth Circuit. However, at oral argument Justice Clement Haynsworth expressed surprise that the trial court had dismissed Lancaster.

Mr. Lancaster's employee, Wayne Sawyer, testified that he and Mr. Lancaster tried to warn each and every driver who came on the premises, and that they would meet the drivers and warn them to watch our for the wires.

> [Mr. Sawyer]: Whenever we called Pantego Distributors—we would like set up a time and date before they come and they always were to call before the truck left Pantego to make arrangements so somebody would be there.
> [Counsel for Vepco]: Why would you have those arrangements?
> [Mr. Sawyer]: Well, you had to sign a ticket and most of the truck drivers wanted a check when they came, so somebody could be there to show them where to dump and also to watch out for the wires.

324A 325A

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> [Counsel for Vepco]: Why was it you told them about these wires?
> [Mr. Sawyer]: Well, we were trying to avoid a situation that has happened now. We didn't want anybody getting tangled up in the wires.

326A

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> [Counsel for Singleton]: Isn't it true that when the truckers arrived at the dump site the first thing you do

is get them out and point the wires out and show them to them? You would actually point the wires out to them and show them, wouldn't you?
[Mr. Sawyer]: Yes, sir.

339A

When Mr. Singleton arrived at the dump site he testified that it was partially cloudy (163A). He denied that he had been warned of the wires (263A). He was the only truck driver who had not been warned by Lancaster or his employees of the presence of overhead wires before unloading the wood chips (344A). Thus, even though the Respondent claims these wires were so open and obvious that anyone would have seen them, the *first* driver who was not warned was severly injured.

In light of such testimony, and where credibility was obviously a factor, it was the jury's function to determine the fact issues of "visibility" and "negligence." The trial court usurped the powers of the jury by substituting its judgment for that of the jury. Under these circumstances it violated Mr. Singleton's Seventh Amendment right to trial by jury. Any seeming curtailment of that right should be scrutinized with the utmost care. *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

CONCLUSION

The Respondent's reliance on Virginia law is without merit. *Winesett v Vepco, supra,* has revealed that the trial court and the Fourth Circuit were in error in their interpretation of Virginia law concerning contributory negligence, and that even under state law the jury's decision in *Singleton* was proper.

Furthermore, each citizen of the United States looks to the Supreme Court as the ultimate enforcer of its Constitutional rights, of which trial by jury may indeed be the most sacred. It is respectfully contended that the Court should exercise its power to grant certiorari and ultimately reverse the decision of the lower court.

Respectfully submitted this the 22nd day of August, 1983.

Leonard T. Jernigan, Jr.
MICHAELS & JERNIGAN
Cooper Square
17 Glenwood Avenue
Raleigh, North Carolina 27603

and

MOODY, STROPLE, BRAHM
& LAWRENCE, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705-1138

CERTIFICATE OF SERVICE

I hereby certify that on this date, three (3) copies of the Reply Brief were mailed postage prepaid, to Mr. G.H. Gromel, Jr. and Mr. Matthew J. Calvert, of HUNTON & WILLIAMS, P.O. Box 1535, Richmond, Virginia 23212, counsel for the respondent. I further certify that all parties required to be served have been served.

This the 22nd day of August, 1983.

LEONARD T. JERNIGAN, JR.
MICHAELS & JERNIGAN
Cooper Square
17 Glenwood Avenue
Raleigh, North Carolina 27603

and

MOODY, STROPLE, BRAHM
& LAWRENCE, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705-1138